Filed 2/6/19 In re A.M. CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re A.M., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. A.M., Defendant and Appellant.	F077347 (Madera Super. Ct. No. MJL018368B) **OPINION**

THE COURT[*]

APPEAL from a judgment of the Superior Court of Madera County. Thomas L. Bender, Judge.

Jennifer Mouzis, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez, Amanda D. Cary, and Lewis A. Martinez, Deputy Attorneys General, for Plaintiff and Respondent.

[*] Before Poochigian, Acting P.J., Detjen, J. and DeSantos, J.

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INTRODUCTION

Minor, A.M., appeals from a juvenile court's adjudication and dispositional orders entered finding him in contempt under Penal Code section 166 based on failure to obey all laws. He argues that substantial evidence does not support the finding that he failed to obey all laws due to his possession of marijuana. Appellant also contends that the juvenile court abused its discretion by punishing him pursuant to the general criminal contempt statute (Pen. Code, § 166) rather than the juvenile contempt statute (Welf. & Inst. Code, § 213) and that use of the criminal contempt statute was contrary to equal protection provisions of the state and federal constitutions. Respondent concedes error as there was not sufficient evidence that appellant failed to obey all laws and that it was improper to use the criminal contempt statute. We reverse in part, finding that there was insufficient evidence that appellant failed to obey all laws, strike the maximum term of confinement from the dispositional order, and otherwise affirm.

FACTUAL AND PROCEDURAL SUMMARY

On December 20, 2017, the Madera County District Attorney filed a juvenile wardship petition, the A petition,[1] against appellant (Welf. & Inst. Code, § 602) alleging that he had driven without a license (Veh. Code, § 12500, subd. (a)). An initial appearance hearing was held, at which appellant denied the allegations contained in the A Petition. The juvenile court issued orders for appellant to report to the probation officer, obey all laws, attend school, and be subject to a curfew.

On January 31, 2018, a jurisdictional hearing was held. Appellant admitted he violated Vehicle Code section 12500, subdivision (a), a misdemeanor, with a maximum confinement time of six months. On March 1, 2018, the probation officer informed the

[1] As described herein, two wardship petitions were filed against appellant. We shall refer to them as the "A petition" and "B petition," respectively.

court that appellant had not contacted the probation department to assist in preparation of the dispositional report and risk assessment. On March 13, 2018, the probation officer advised the court that appellant was arrested the day before for failing to attend school as directed. The probation department explained that appellant's father appeared at the probation department and was told to retrieve appellant from school and return with him to probation. Appellant's father returned to probation and advised them that his son was not in school and his whereabouts were unknown. The father returned to probation that afternoon with appellant. Appellant was arrested for failing to comply with the court's temporary orders and was transported to the juvenile detention facility. Appellant smelled of marijuana, and he admitted to using marijuana two days prior to his arrest.

On March 13, 2018, the Madera County District Attorney filed a second juvenile wardship petition (Welf. & Inst. Code, § 602), the B petition, alleging that appellant committed contempt of court by willfully disobeying a court order by failing to attend school (Pen. Code, § 166, subd. (a)(4)). The next day, March 14, 2018, the court held a detention hearing. Appellant denied the allegations of the petition. The juvenile court found that continuance in the home of the parent would be contrary to appellant's welfare and placed appellant in the temporary care of the probation officer. On March 29, 2018, the district attorney amended the B petition adding an additional count that appellant committed contempt of court for possession of marijuana in addition to the count for failing to attend school. The wardship petition alleged a maximum term of confinement of one year four months.

On April 2, 2018, the court held a delinquency proceeding addressing both petitions. With respect to the A petition, the juvenile court declared appellant a ward of the court and found a maximum term of confinement of six months on the Vehicle Code section 12500 offense. With respect to the B petition, the court proceeded to hold a contested jurisdiction hearing. The trial court found appellant's failure to obey all laws based on failure to attend school not true, but his failure to obey all laws based on

possession of marijuana true. The juvenile court found the violation of Penal Code section 166, subdivision (a)(4), for possession of marijuana was a misdemeanor. On May 16, 2018, the trial court held a dispositional hearing on the B petition, and committed appellant to 22 days of juvenile hall, with credit for 22 days of time served.

DISCUSSION

I. Sufficiency of the Evidence

Appellant contends there was insufficient evidence that he had failed to obey all laws based on the evidence presented that he was in possession of marijuana. Respondent agrees.

Our review of a claim of insufficiency of the evidence in a juvenile criminal case is governed by the same deferential standard that applies to an insufficiency of the evidence claim in an adult criminal case. (*In re V.V.* (2011) 51 Cal.4th 1020, 1026.) Under that standard, we determine whether, after viewing the evidence in the light most favorable to the prosecution, any reasonable fact finder could have found the elements of the crime to be true beyond a reasonable doubt. (*Ibid.*) We do not reweigh the evidence or reevaluate the credibility of witnesses. (*People v. Jennings* (2010) 50 Cal.4th 616, 638.) We also presume the existence of every fact the trier of fact reasonably could infer from the evidence. (*In re V.V., supra*, 51 cal.4th at p. 1026.) " ' "A reasonable inference, however, 'may not be based … on imagination, speculation, supposition, surmise, conjecture or guess work….' " [Citations.]' [Citation.] " (*People v. Sifuentes* (2011) 195 Cal.App.4th 1410, 1416, disapproved on other grounds in *People v. Farwell* (2018) 5 Cal.5th 295, 304, fn. 6.)

The evidence provided to support the finding that appellant was in possession of marijuana was based on the fact that appellant smelled of marijuana when he was brought into custody and that he admitted that he had used marijuana several days earlier. "[E]vidence of having introduced a controlled substance into one's body may be evidence of having possessed it--in many cases, 'one who ingests a drug must have possessed it at

least temporarily.' [Citation.] As long as the past possession occurred within the statute of limitations period, it could be punished as such. [Citation.]" (*People v. Morales* (2001) 25 Cal.4th 34, 44.) But being under the influence of a contraband substance, or other evidence of having introduced it into one's body, is not by itself proof of present or past possession. (*Ibid.*) " '[E]vidence of drug ingestion' without more 'is insufficient to sustain an unlawful possession charge.' [Citation.]" (*Id.* at p. 45; *People v. Palaschak* (1995) 9 Cal.4th 1236, 1239.) " '[D]epending on the circumstances, mere ingestion of a drug owned or possessed by another might not involve sufficient control over the drug, or knowledge of its character, to sustain a drug possession charge.' [Citations.]" (*People v. Morales*, *supra*, at p. 45.)

Respondent concedes that there is not substantial evidence that appellant failed to obey all laws based on possession of marijuana. The evidence that appellant smelled of marijuana and that he ingested it several days before is inferential evidence that appellant may have possessed marijuana. However, without additional evidence, reliance on the inferences created by the evidence would not be reasonable because the finding would rely on speculation that he actually possessed the marijuana. (*People v. Sifuentes, supra*, 195 Cal.App.4th at p. 1416.) We concur that there was not substantial evidence to support the charge.

II. Use of Generic Contempt Statute Rather than Juvenile Contempt Statute

Appellant next contends that the juvenile court abused its discretion in punishing him under the general criminal contempt statute, Penal Code section 166, rather than the specific contempt statute for juveniles, Welfare and Institutions Code section 213. Respondent concedes that the juvenile court erred in utilizing Penal Code section 166. (See *In re Ricardo A.* (1995) 32 Cal.App.4th 1190, 1195 (*Ricardo A.*).) As explained in *Ricardo A.*, contempt charges cannot be brought under the general statute when the basis of the contempt is disobedience of a juvenile court's probation order, "and not separate crimes." (*Id.* at p. 1199.) By the very language of *Ricardo A.*, violations of probation

conditions are status offenses, not crimes. Regardless, as there was insufficient evidence to support the charge, the use of the wrong contempt statute is moot.[2]

III. The Juvenile Court Erred in Setting a Maximum Term of Confinement

At the May 16, 2018 disposition hearing on the B petition, the juvenile court set a maximum period of physical confinement at eight months. However, because appellant was placed on home probation, and not removed from the physical custody of his parents, the juvenile court erred in setting a maximum term of confinement. (See Welf. & Inst. Code, § 726, subd. (d); *In re Matthew A.* (2008) 165 Cal.App.4th 537, 541 [court is required to specify maximum period of physical confinement only when minor is removed from the physical custody of his or her parent or guardian].) Accordingly, we strike the maximum term of confinement from the juvenile court's disposition order. (*See In re A.C.* (2014) 224 Cal.App.4th 590, 592 ["where a juvenile court's order includes a maximum confinement term for a minor who is not removed from parental custody, the remedy is to strike the term"].)

DISPOSITION

The true finding as to count 2 of the B petition, failing to obey all orders, is reversed. The jurisdictional and disposition orders, as reflected in the juvenile court's April 12 and May 16, 2018 minute orders, are modified to reflect that the true finding with respect to count 2 is reversed and the maximum term of confinement is stricken. The disposition orders made on April 2, 2018, regarding the A petition shall remain in full force and effect.

[2] Likewise, we need not address appellant's argument that the use of the adult criminal contempt statute violated equal protection principles.